

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

LARRY G. PHILPOT,

§

Plaintiff

§

V.

§

Civil Action No. 1:18-cv-816

EMMIS OPERATING COMPANY

§

Defendant.

§

PLAINTIFF'S FIRST AMENDED COMPLAINT AND JURY DEMAND

Plaintiff Larry G. Philpot (“Philpot” or “Plaintiff”) files this Original Complaint against Defendant Emmis Operating Company (“Emmis” or “Defendant”) on personal knowledge as to all facts regarding himself and on information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

Photographers create pieces that extend well beyond the four corners of the photograph to evoke sentiments within the viewer so that the viewer is a part of the moment captured in time. For concert photographers, the odds are almost always against them—the musicians are constantly moving, the lighting is usually dark and typically changing, and it is practically impossible to secure a good vantage point. But every now and then, a photographer is able to get a great shot, the kind of iconic shot that does exactly what photographs are supposed to do, make the viewer a part of that very moment in time.

Larry Philpot, an experienced freelance photographer, created an iconic photograph of Willie Nelson, capturing a moment in time amidst the turbulence of a music concert. This

photograph is the type of awe-inspiring work that can make a successful photography career. Philpot offered the photograph under a Creative Commons license, permitting members of the public to use the photos provided that the photos are properly attributed to Philpot.

Defendant Emmis published Philpot's photograph of Willie Nelson onto its former website, www.texasmonthly.com, as its own. Emmis then sold that website, including Philpot's photograph of Willie Nelson, to a third party. Emmis did not attribute the photograph to Philpot, thereby infringing on Philpot's copyrighted work. In freelance photography, the reputation and licensing revenue guarded by copyright law are a photographer's sole means to support their career. Emmis stole both of those from Philpot. Larry Philpot brings this action to protect not just his rights under copyright law, but also his livelihood as a photographer.

II.

PARTIES

A. Plaintiff

1. Plaintiff Larry G. Philpot is a citizen and resident of the State of Indiana. Philpot is a renowned freelance photographer who specializes in photographing concerts and musical performances across the United States.

B. Defendant

2. Defendant Emmis Operating Company is an Indiana company with its principal place of business in Indianapolis, Indiana that may be served via its registered agent, CT Corporation System, at 1999 Bryan Street, Suite 900, Dallas, Texas 75201-3136 or wherever it may be found.

III.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this civil action presents a federal question as Plaintiff presents a civil claim arising under the Constitution, laws, or treaties of the United States.

4. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338(a) because this civil action arises under an Act of Congress relating to copyrights, namely the Copyright Act of the United States, 17 U.S.C. § 101, *et seq.*

5. This Court has personal jurisdiction over Emmis Operating Company because it conducts business in the State of Texas.

6. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and 1400(a) because Defendant Emmis Operating Company resides and may be found in this District.

IV.

FACTUAL BACKGROUND

A. The Highly Competitive World of Freelance Concert Photography

7. To say that concert photography is a tough business is a severe understatement. Before having the opportunity to even take a photo, concert photographers must invest in expensive equipment and negotiate to obtain access to the concert stage. At the concert, they must battle all the variables that arise from an uncontrolled setting—a rowdy crowd, horrible lighting that is always changing, and musicians constantly moving. Not to mention, it is really loud. As a result, despite all of their efforts and hard work, concert photographers often take photographs that are entirely unusable, where the rock stars appear as blurs and washy blobs.

8. Financially, it can be difficult to maintain a steady income stream from concert photography. Freelance concert photographers only earn money when they license or sell their

work product. If the photographs are unusable, which is often the case, or simply aren't good, then the photographers do not receive any type of payment.

9. And, in today's technological age where anyone with a smart phone can take pictures at concerts, concert photography is becoming significantly more competitive, making it even more imperative to capture *the* perfect shot. Because that is all that there is demand for—a few once-in-a-lifetime shots for each star. It doesn't matter if a concert photographer takes 100 good shots of a star at a concert—an article about Willie Nelson, for example, only needs one picture of Willie Nelson—*the best one*.

10. In such a competitive environment, it is essential that concert photographers receive the compensation and credit to which they are entitled, but also need to advance their career.

B. Larry Philpot: A Professional Concert Photographer

11. Larry Philpot is a renowned freelance photographer who specializes in taking photographs of musicians at concerts and other performances. Philpot has invested thousands of dollars in equipment and has spent years perfecting his craft. He has established a strong reputation for himself and his work, and due to his professional reputation, he often obtains privileged access to take photographs of musical performers at concerts.

12. Philpot's reputation as a premier photographer is critical to his business. The more his photographs are viewed with proper attribution provided to him, the more access he can obtain to take celebrity photographs, and the more he can command in licensing fees.

13. Philpot regularly licenses his photographs to end customers, including Rolling Stone—it is how he earns his living and expands his business. Philpot has also licensed his photographs to premier musicians, including Willie Nelson, Foreigner, KISS, John Mellencamp, Kid Rock, and Heart.

C. Philpot Creates the Willie Nelson Photograph

14. On October 4, 2009, Philpot created a photograph of Willie Nelson in St. Louis, Missouri (the “Willie Nelson Photo”). A copy of the Willie Nelson Photo is attached as Exhibit A.

15. The Willie Nelson Photo is an original work that Philpot registered with the United States Copyright Office as part of a collection of photographs on September 5, 2012. The Willie Nelson Photo is registered with the United States Copyright Office under Certificate Number VAu 1-132-411. A copy of the copyright registration certificate for the Willie Nelson Photo is attached as Exhibit B.

16. Philpot first displayed the Willie Nelson Photo on May 31, 2011 on the Wikimedia website.

17. The Willie Nelson Photo has become one of the most widely-viewed pictures of Willie Nelson.

D. The Creative Commons License

18. A Creative Commons license is a simple, standardized copyright license that anyone can use to license their work. The copyright holder designates their work as governed by a Creative Commons license, and anyone may use the work provided they adhere to the terms of the license.

19. In an effort to market his freelance photography practice, Philpot offered the Willie Nelson Photo through Wikimedia for distribution, public display, and public digital performance under a Creative Commons Attribution 2.0 Generic license (abbreviated as “CC BY 2.0”). A copy of the CC BY 2.0 license is attached as Exhibit C.

20. This license allows anyone to use the work, provided that they, among other requirements:

- a. Include a copy of the Uniform Resource Identifier for the CC BY 2.0;
- b. Provide attribution to the author of the work; and
- c. Provide the Uniform Resource Identifier that the licensor specifies to be included with the work.

E. Restrictions on the Willie Nelson Photo

21. At the Wikimedia website, Larry Philpot provided the following description for the Willie Nelson Photo, “Willie Nelson getting ready to perform. Farm Aid 2009. Photo by Larry Philpot, www.soundstagephotography.com.” Philpot also provided the following requirement for the Willie Nelson Photo: “You must attribute the work in the manner specified by the author or licensor (but not in any way that suggests that they endorse you or your use of the work).”

F. Emmis Infringes Philpot’s Copyright in the Willie Nelson Photo.

22. Emmis owned and operated the website located at www.texasmonthly.com.

23. Emmis used the website at www.texasmonthly.com for financial gain by selling advertising to third parties.

24. The website located at www.texasmonthly.com contained a notation claiming copyright in the website.

25. Emmis infringed Philpot’s copyright in the Willie Nelson Photo by publishing the Willie Nelson Photo on the www.texasmonthly.com website at <https://www.texasmonthly.com/the-culture/bill-oreilly-calls-willie-nelson-a-creep/>. A copy of this webpage as it appeared with the Willie Nelson Photo is attached as Exhibit D.

26. Plaintiff discovered Defendant’s infringement of the Willie Nelson Photo on October 1, 2015.

27. On or about November 1, 2016, Emmis sold the www.texasmonthly.com website, including Philpot's photograph of Willie Nelson, to a third party, further infringing Philpot's copyright.

28. Emmis did not provide attribution to Philpot when it published the Willie Nelson Photo.

29. Emmis did not list or link to Philpot's website, soundstagephotography.com, when it published the Willie Nelson Photo.

G. The Damage Done

30. Emmis passed off Philpot's Willie Nelson Photo as its own, ignoring Philpot's primary requirement under the Creative Commons license to allow Emmis to use his copyrighted work—the credit. Philpot has been deprived of the credit for taking the exceptional Willie Nelson Photo.

V.

CLAIMS

A. Count One: Copyright Infringement

31. Plaintiff realleges and incorporates the allegations set forth in the preceding paragraphs as if set forth in full herein.

32. Defendant operated the website located at www.texasmonthly.com.

33. Defendant published the Willie Nelson Photo at <https://www.texasmonthly.com/the-culture/bill-oreilly-calls-willie-nelson-a-creep/>.

34. Defendant sold the www.texasmonthly.com website, including Plaintiff's Willie Nelson Photo, to a third party.

35. Defendant's acts are and were performed without the permission, license, or consent of Plaintiff.

36. Defendant acted with willful disregard of the laws protecting Plaintiff's copyrights.

37. Defendant infringed Plaintiff's copyrights in the Willie Nelson Photo in violation of 17 U.S.C. § 501.

38. Plaintiff has sustained and will continue to sustain substantial damage in an amount not yet fully ascertainable, including, but not limited to, damage to his business reputation and goodwill.

39. Plaintiff is informed and believes and thereon alleges that Defendant has obtained profits recoverable under 17 U.S.C. § 504. Plaintiff will require an accounting from the Defendant of all monies generated from the Willie Nelson Photo.

40. In the alternative and at his election, Plaintiff is entitled to seek maximum statutory damages for each separate act of willful infringement by Defendant in an amount of \$150,000 per each infringement.

41. Plaintiff has suffered and continues to suffer irreparable harm and damage as a result of the above-described acts. Accordingly, Plaintiff seeks permanent injunctive relief pursuant to 17 U.S.C. § 502, as well as seizure of the Willie Nelson Photo.

42. Plaintiff is entitled to recover from Defendant his attorney's fees and costs of suit, pursuant to 17 U.S.C. § 505.

VI.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

VII.

RELIEF REQUESTED

WHEREFORE, Plaintiff demands that judgment be entered against Defendant as follows:

1. That the Court enter judgment against Defendant that Defendant willfully infringed Philpot's rights in the Willie Nelson Photo made the basis of this suit, in violation of 17 U.S.C. § 501;
2. That the Court issue permanent injunctive relief against Defendant and its agents, servants, employees, representatives, successors and assigns, and all persons, firms, corporations, or other entities in active concert or participation with Defendant, enjoining and restraining them from directly or indirectly infringing the Plaintiff's copyrights in any manner, including generally, but not limited to reproducing, distributing, displaying, performing or making derivatives of any of the Willie Nelson Photo;
3. That the Court enter an order that Defendant:
 - a. retrieve, to the extent possible, all copies of the Willie Nelson Photo;
 - b. inform all recipients of the Willie Nelson Photo of Plaintiff's ownership; and
 - c. inform all recipients of the Willie Nelson Photo that Defendant was not authorized to reproduce, distribute, display, perform, or make derivatives of the Willie Nelson Photo;
4. Defendant be required to pay actual damages, statutory damages, and disgorgement of all profits derived by Defendant from its acts of copyright infringement;
5. Defendant be required to pay Plaintiff the costs of this action, prejudgment interest, and reasonable attorney's fees; and
6. Plaintiff be granted all other and further relief to which he is entitled.

Dated: January 18, 2019

Respectfully submitted,

HUTCHERSON LAW PLLC

/s/ Kenton J. Hutcherson
Kenton J. Hutcherson
Texas State Bar No. 24050798
Hutcherson Law PLLC
3131 McKinney Avenue, Suite 600
Dallas, Texas 75204
Tel: (214) 443-4200
Fax: (214) 443-4210
Email: kjh@hutchersonlaw.com

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2019, I electronically transmitted the foregoing to the Clerk's Office using the CM/ECF System for filing to the following CM/ECF participants:

Lawrence A. Waks, Esq.
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260 Addie Roy Road, Suite 300
Austin, Texas 78746
Telephone: (512) 314-9601
Fax: (512) 314-9694
Email: Lawrence.Waks@wilsonelser.com

Attorney for Defendant

I further certify that on January 18, 2019, I will serve a courtesy copy of the aforementioned document and transmittal of a Notice of Electronic Filing by mail on the following:

The Honorable Judge Robert Pitman
United States District Court
501 West 5th Street
Suite 5300
Austin, Texas 78701

/s/ Kenton J. Hutcherson
Kenton J. Hutcherson

EXHIBIT A



EXHIBIT B

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Register of Copyrights, United States of America

Registration Number

VAU 1-132-411

Effective date of registration:

September 5, 2012

Title

Title of Work: 2009 Musician Photos

Contents Titles: 2009 Musician Photos

Completion/Publication

Year of Completion: 2009

Nation of 1st Publication: United States

Author

■ **Author:** Larry Gene Philpot

Author Created: photograph(s)

Work made for hire: No

Citizen of: United States

Domiciled in: United States

Year Born: 1953

Copyright claimant

Copyright Claimant: Larry Gene Philpot

12527 Winding Creek Lane, Indianapolis, IN, 46236

Rights and Permissions

Name: Larry Philpot

Email: larrygphilpot@gmail.com

Telephone: 317-567-1338

Address: 12527 Winding Creek Lane

Indianapolis, IN 46236 United States

Certification

Name: Larry G. Philpot

Date: September 5, 2012



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EXHIBIT C

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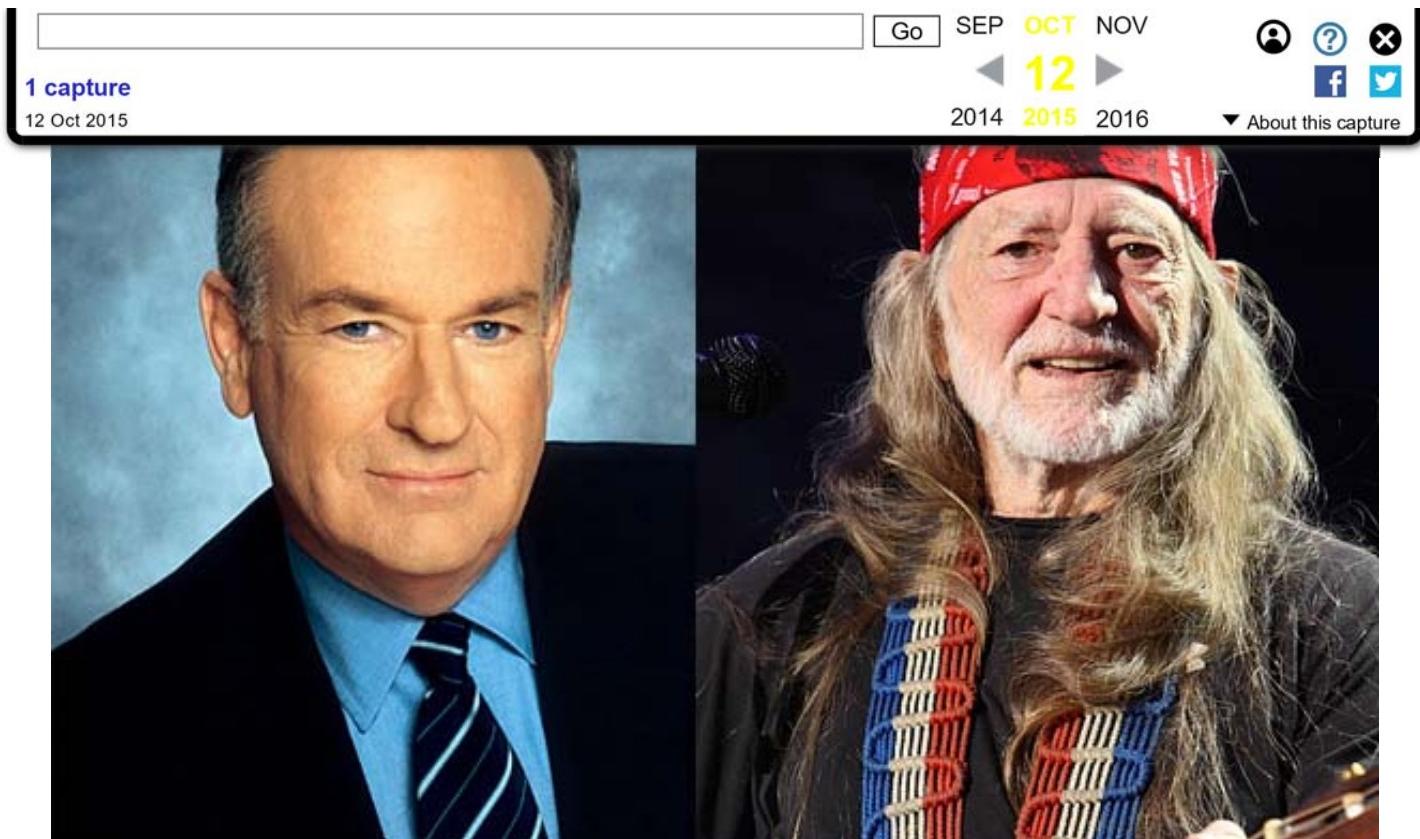
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Bill O'Reilly Calls Willie Nelson a "Creep"

BILL O'REILLY CALLED WILLIE NELSON A "CREEP" ON FOX AND FRIENDS THURSDAY MORNING FOR GLAMORIZING DRUG USE.

JANUARY 21, 2013 | *by SONIA SMITH* | COMMENTS



FOX NEWS & FLICKR/BEHIND THE MUSIC

Bill O'Reilly **dropped by** *Fox and Friends* Thursday morning to talk about Whitney Houston's death and ended up calling Willie Nelson a "creep:"

Why aren't we telling the truth to young people in America? Is there one public service announcement by any movie star, by any singer that says to children 'don't use drugs'? Is there one, I want to see one. There isn't any. Here's what we see—Snoop Dogg, Willie Nelson, all of these creeps—and I mean they are *creeps*—celebrated. And it's "wink wink," "oh let's party, lets get high." There's nobody in the media saying this could lead to death and if it doesn't lead to death.

(No word on why O'Reilly didn't also single out Armie Hammer, the **third celebrity recently ensnared by the Sierra Blanca checkpoint.**)

It should be noted that this isn't the first time O'Reilly has attacked Willie on air. Back in 2008, O'Reilly **called** Willie Nelson a pinhead after the singer appeared on

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12 Oct 2015

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